

AFFIDAVIT OF WITNESSES

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

My name is Florence Wong I reside at 709 East 9 St.
(Number and street)

NY NY, and
(City or town) (State)

My name is Doris Pong I reside at 705 East 9 St.
(Number and street)

NY NY
(City or town) (State)

I personally know the petitioner named in this petition for naturalization, of which this affidavit is a part, to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and that he is now and has been for at least 90 days actively serving honorably in the Armed Forces of the United States.

I do swear (affirm) that the statements of fact I have made in this affidavit of this petition for naturalization subscribed by me are true to the best of my knowledge and belief: SO HELP ME GOD.

Sgd. FLORENCE WONG
(Signature of witness)

Sgd. DORIS PONG
(Signature of witness)

WHEN OATH ADMINISTERED BY CLERK OR DEPUTY
CLERK OF COURT

Subscribed and sworn to before me by the above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit in the office of the Clerk of said Court at New York, New York this 22 day of December, A. D. 1955

WILLIAM V. CONNELL,
Clerk.

By Sgd. Wm. C. MULLER,
Deputy Clerk.

[SEAL]

OATH OF ALLEGIANCE

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic;

renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic;

that I will bear true faith and allegiance to the same;

that I will bear arms on behalf of the United States when required by law; or

that I will perform noncombatant service in the Armed Forces of the United States when required by the law; or

that I will perform work of national importance under civilian direction when required by the law;

and that I take this obligation freely without any mental reservation or purpose of evasion: So HELP ME GOD. In acknowledgment whereof I have hereunto affixed my signature.

Sgd. TAK SHAN FONG
(Signature of petitioner)

Sworn to in open court, this JUL 23 1956

HERBERT A. CHARLSON,
Clerk.

By Sgd. J. E. HAMER,
Deputy Clerk.

findings of facts

*See Opinion by Judge
Murphy dated 6/22/56 at-
tached.*

NOTE.—In renunciation of title or order of nobility, add the following to the oath of allegiance before it is signed: "I further renounce the title of (give title or titles) which I have heretofore held." or "I further renounce the order of nobility (give the order of nobility) to which I have heretofore belonged."

Petition granted: Line No. 1 of List No. 20722 and Certificate No. 7616112 issued.

Petition denied: List No.

Dec. res. #20586 4/16/56

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SUPREME COURT. U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 110

TAK SHAN FONG, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 16, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

[fol. 4]

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Petition No. 669690

Petition for naturalization

of

TAK SHAN FONG

FINDINGS OF FACT AND CONCLUSIONS OF LAW GRANTING
PETITION FOR NATURALIZATION—June 22, 1956

I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT:

- (a) Petitioner is an alien who filed his petition for naturalization on December 22, 1955, under P. L. 86, 83rd Congress, approved on June 30, 1953;
- (b) Petitioner did serve on an active duty status in the Armed Forces of the United States and was honorably released therefrom; and
- (c) Petitioner has been lawfully admitted to the United States, to wit, at the Port of Honolulu, T. H., on August 24, 1951.

[fol. 5] CONCLUSION OF LAW:

- (a) That the petition for naturalization should be granted.

Thos. F. Murphy, U.S.D.J.

Dated, New York, N. Y., June 22, 1956.

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Order No. 20722

ORDER OF COURT DENYING PETITIONS
FOR NATURALIZATION—July 23, 1956

United States of America
Southern District of New York—ss:

Upon consideration of the petitions for naturalization recommended to be denied, listed on List 20722 sheet 1 dated July 23, 1956, presented in open Court on the 16th day of April, A. D., 1956, it is hereby ordered that each of the said petitions, except those petitions listed below, be, and hereby is, denied. Decision reserved by Judge Thomas F. Murphy.

[fol. 6] It is further ordered that the recommendation of the designated examiner is disapproved as to the persons listed below, and each of said petitioners so listed having appeared in person in open Court the day of, 19.....; and each having taken the oath of allegiance required by the naturalization laws and regulations, it is hereby ordered that each of them be, and hereby admitted to become a citizen of the United States of America. See Findings of Fact, Conclusions of Law by Judge Murphy, dated June 22, 1956, directing granting of petition after final hearings.

It is further ordered that prayers for change of name listed below be and hereby are granted, except petition(s) No.

Petition

<i>No.</i>	<i>Name of Petitioner</i>	<i>Change of Name</i>
669690	Tak Shan Fong	Formal objection taken and exception noted.

It is further ordered that petitions listed below be continued for the reasons stated.

By the Court, this 23rd day of July, 1956.

Thos. F. Murphy, U. S. D. Judge.

There appears to be no exceptions to the express requirements laid down by Congress, that a petitioner under this Act either be lawfully admitted into the United States for permanent residence or be lawfully admitted into United States for some other admissible purpose. House Report No. 223 (1953) submitted with the bill which became Public Law 86, states, "It contemplated benefits only for the alien who has effected lawful entry, either in an immigrant or non-immigrant status." And as this Court said in *In re Apolonia* [sic], 128 F. Supp. 288., "The situation might be quite different in the case of a seaman who 'jumped ship' and never acquired any legal right to admittance." Countless seaman [sic] have been lawfully admitted to the United States in pursuit of their calling. This is in recognition of the physical requirements of maritime commerce. In the instant case, however, petitioner, in plain disregard, if not defiance, of the immigration order made pursuant to law and regulations, to remain on board, deserted and escaped from the vessel.

3. In accordance with the authority contained in Section 335 of the Immigration and Nationality Act, I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT:

- (a) That petitioner is an alien, who filed his petition for naturalization on December 22, 1955 under P. L. 86, 83rd Congress, approved on June 30, 1953[.]

[fol. 12] (b) That petitioner did serve on an active duty status in the Armed Forces of the United States and was honorably released therefrom, and

- (c) That petitioner has not been lawfully admitted to the United States at any time.

CONCLUSION OF LAW:

That the petitioner may not be granted naturalization or be naturalized under the provisions of the Act approved June 30, 1953, Public Law 86, 83rd Cong [.,]; 67 Stat. 108; 8 U. S. C. 1440(a).

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 110

TAK SHAN FONG, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings in U.S.C.A. for the Second Circuit		
Statement under Rule 15(b)	1	1
Appendix to appellant's brief consisting of proceedings in U.S.D.C. for the Southern District of New York		
Petition for naturalization	2	2
Findings of fact and conclusions of law granting petition for naturalization	2	3
Order denying petitions for naturalization	4	4
Notice of appeal	5	5
Exhibit 1—Findings of fact, conclusions of law and recommendation of designated naturalization examiner	7	6
Exhibit 2—Certificate of arrival of alien seaman or airman	9	7
Per curiam opinion	12	11
Judgment	14	13
Clerk's certificate (omitted in printing)	18	15
Order allowing certiorari	20	15
	21	16

4. I recommend that this petition for naturalization be denied on the ground that the petitioner has failed to establish lawful admission to the United States as required by law.

Respectfully submitted,

JAMES P. DILLON
Designated Naturalization Examiner

Date
Jan 4 1956

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

EXHIBIT 2

Certificate of arrival of alien seaman or airman.

(PHOTOPRINT)

*[For convenience of Court and Counsel this Exhibit is
bound in on the opposite page.]*

[fol. 7]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Civ. No. 112-366

In the Matter of the Petition for Naturalization of
TAK SHAN FONG
(Petition No. 669690, S. D. N. Y.)

UNITED STATES OF AMERICA, Appellant,

v.

TAK SHAN FONG, Appellee.

NOTICE OF APPEAL—Filed September 6, 1956

Sirs:

Please take notice that the United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the decision, order, decree and judgment of this Court, dated June 22, 1956, wherein and whereby the petition for naturalization of the above-named petitioner, Tak Shan Fong, for naturalization as a citizen of the United States, was granted over the objections of the Immigration and Naturalization Service, and from [fol. 8] each and every part of said decision, order, decree and judgment.

Dated: New York, N. Y., September 6, 1956.

Yours, etc.,

Paul W. Williams, United States Attorney for the
Southern District of New York, Attorney for
Appellant, Office and P. O. Address: United States
Court House, Foley Square, New York 7, N. Y.

To: Jerome J. Coin, Esq., Attorney for Appellee, 33 West 42nd Street, New York 36, N. Y.

Hon. Herbert A. Charlson, Clerk, United States District Court, Southern District of New York, United States Court House, Foley Square, New York 7, N. Y.

[fol: 9]

EXHIBIT 1

IN THE DISTRICT COURT OF THE
UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION No. 669690

PETITION FOR NATURALIZATION

of

TAK SHAN FONG.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
RECOMMENDATION OF DESIGNATION [sic]
NATURALIZATION EXAMINER

*To the Honorable, the Judges of the United States District
Court for the Southern District of New York:*

1. The undersigned, duly designated under the Immigration and Nationality Act to conduct preliminary examinations upon petitions for naturalization, respectfully presents: The petitioner, a 26 year old single male, native and citizen of China, arrived aboard the S/S "OCEAN STAR" at Newport News on January 27, 1952 in the capacity of cabin-boy crewman. On inspection by the Immigration Service, he was ordered detained on board, proper notice being served on the Master, as a person inadmissible as a bona fide seaman. Official records show that he deserted the vessel and escaped.

[fol. A]

[File endorsement omitted]

[fol. 1]

**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

OCTOBER TERM, 1957

Docket No. 24420

[Appeal Filed Under District Court Docket No. 112-366,
S. D. N. Y.]

In the Matter of the Application of
TAK SHAN FONG, Petitioner,
Petition No. 669690.

UNITED STATES OF AMERICA, Respondent-Appellant,

v.

TAK SHAN FONG, Petitioner-Appellee.

STATEMENT UNDER RULE 15(b)

A Petition for Naturalization as a United States citizen was filed by Tak Shan Fong in the District Court for the Southern District of New York on December 22, 1955. Following the filing of the Findings, Conclusions and Recommendation of the Designated Naturalization Examiner recommending denial of the Petition, and after a hearing without testimony before the District Court, [fol. 2] Judge Murphy filed Findings of Fact and Conclusions of Law on June 22, 1956, granting the Petition for Naturalization and admitting Tak Shan Fong to citizenship. The formal order was filed on July 23, 1956. Notice of Appeal was filed on September 6, 1956 under Civil Docket No. 112-366 after the filing of an order of the District Court extending the time of the Government to

(Page 11)

CERTIFICATE OF ARRIVAL OF ALIEN SEAMAN OR AIRMAN
NY File Unknown U. S. DISTRICT COURT
SO. DIST. of N. Y.

District Director
New York, N. Y.

Port of Norfolk, Va.

Date June 10, 1952

EXHIBIT #1

I HEREBY CERTIFY that the following is a correct record and statement of facts relative to the arrival in the United States of the alien named below:

- APR 16 1952
- (1) Crew-list sheet No. 2 Line No. 21 No. airman's license
- (2) Crew-list visaed: By Am. Consul, Colombo, Ceylon, Dec. 10, 1951.
- (3) Nationality and name of vessel or aircraft No. Pan. SS "OCEAN STAR" Line: -
- (4) Port at which arrived: Newport News, Va. Date: Jan. 27, 1952
- (5) Vessel or aircraft arrived from: Visagapatam, India Left that port on: -
- (6) Name: Tak Shan Fung Age: 22 Sex: Male
- (7) Nationality: China Race: China Able to read: No
- (8) State whether member of crew last preceding voyage of vessel to U. S.: Yes
- (9) Position in vessel's company or on aircraft: Pantry Boy Length of service at sea or in air: 1 Yr.
- (10) Shipped or engaged—When: April 27, 1951 Where: Hong Kong
- (11) Whether to be paid off or discharged at port of arrival: No

or on aircraft: Pantry boy

at sea or in air: - - -

- (10) Shipped or engaged—When: April 27, 1951 Where: Hong Kong
- (11) Whether to be paid off or discharged at port of arrival: No
- (12) Height: 5' 8" Weight: 135
- (13) Physical marks, peculiarities, or disease: -
- (14) Head tax paid: No
- (15) Record of any legal admission for permanent residence: No

(16) Admitted under Sec. Act for period of

(17) Examined by Inspector: Douglas

(18) Reported on Form I-489 (old 689) dated Norfolk, Va., as Fung Tak Shan

~~Deserting Seaman~~

2-9-52

Deserting Seaman:

~~Deserting Seaman~~

(19) Remarks: Alien ordered detained on board account not in possession of proper travel document. Escaped; fine proceedings instituted.

EX 71 ✓

DANIEL R. MORGAN
Officer in Charge, Norfolk, Va.

(Official title)

THIS FORM IS INSUFFICIENT AS A BASIS FOR A PETITION

FOR A PETITION FOR NATURALIZATION

Exhibit 2

On February 8, 1952, petitioner got a job as dishwasher in a New York City restaurant. On June 8, 1952 he was [fol. 10] apprehended, accorded a hearing in deportation proceedings, he testified he did not see any immigration officers aboard the vessel at any time when he arrived. He next stated that he left the vessel two days after he arrived and did not obtain permission to leave. He later stated that he asked an officer of the vessel and was given permission to leave and he left the ship at 8.00 P. M., going to New York to visit friends and after four days returned to find the vessel gone.

Exhausting his administrative remedies, petitioner was ordered deported by warrant dated, January 15, 1954. Delivery bond was cancelled upon this Service learning petitioner had been inducted into the Army on May 4, 1953. Thereafter petitioner served in an active duty status until May 3, 1955, being released, honorably. He did not serve overseas.

The question presented is whether petitioner has established the essential statutory allegation #7 in his petition, to wit, that he was lawfully admitted into the United States as required by the law.

2. P. L. 86, 83rd Cong., 67 Stat. 108; 8 U. S. C. 1440(a) approved June 30, 1953 under which this serviceman filed his petition for naturalization provides in material part as follows:

“ . . . any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has served, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent resident, or (2) having been lawfully admitted to the United States, [fol. 11] and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955. . . . ”

file its appeal from the order admitting appellee to citizenship.

Appellee is represented by Jerome J. Coin, Esq. The Appellant, United States of America, is represented by Paul W. Williams, United States Attorney.

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

Appendix to Appellant's Brief—Filed November 20, 1957

PETITION FOR NATURALIZATION
(PHOTOPRINTS)

*[For convenience of Court and Counsel this Document is
bound in on the opposite page.]*

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

ORIGINAL

(To be retained
by Clerk of Court)No FEE
lpw

PETITION FOR NATURALIZATION

No. 669690

(Under act of June 30, 1953, P. L. 86, 83d Congress, by a
member or former member of the Armed Forces)*To the Honorable the US DISTRICT Court of SOUTHERN
DISTRICT at New York, New York**This petition for naturalization, hereby made and filed,
respectfully shows:*(1) My full true and correct name is **TAK SHAN FONG**(Do not abbreviate. Show also any
other name which has been used)(2) My present place of residence is **705 East 9 St.,**

(Number and street)

New York, NY NY

(City or town) (State or country)

(3) I was born on **March 29, 1929** in **Tientsin, China**

(Month) (Day) (Year) (City or town) (Country)

(4) My personal description is as follows: Sex **Male**, com-
plexion **yellow**, color of eyes **Brown**, color of hair **Black**,
height **5 feet 8 inches**, weight **132 pounds**, visible distinctive
marks **None**; country of which I am a citizen, subject, or
national **China**(5) I am **not** married; the name of my wife or husband
is(6) I have **no** children; and the name, sex, place and date
of birth, and present place of residence of each of said chil-
dren who is living, are as follows:

NAME	SEX	PLACE BORN	DATE BORN	NOW LIVING AT-
------	-----	------------	--------------	-------------------

dren who is living, are as follows:

NAME	SEX	PLACE BORN	DATE BORN	NOW LIVING AT-
.....
.....
.....
.....

(7) I was lawfully admitted to the United States at
Newport News, Virginia under the name of **Tak Shan Fong**

(City or town) (State)

on **January 27, 1952** on the **SS Ocean Star**

(Month) (Day) (Year) (Name of vessel or other means of conveyance)

(8) I actively served honorably in US Army under Service

(Name of branch of service)

No. **US 51239856** from **May 4, 1953** to **May 3, 1955**, I was
physically present in the United States for a single period
or at least 1 year at the time of entering such service.

(9) I desire to have my name changed to

(10) It is my intention in good faith to become a citizen of
the United States and to renounce absolutely and entirely
all allegiance and fidelity to any foreign prince, potentate,
state, or sovereignty of whom or which at this time I am
a subject or citizen. (11) It is my intention to reside perma-
nently in the United States. (12) I am not and have not
been for a period of at least 10 years immediately preceding
the date of this petition a member of or affiliated with any
organization proscribed by the Immigration and Nationality
Act or any section, subsidiary, branch affiliate, or subdivi-
sion thereof nor have I during such period engaged in or
performed any of the acts or activities prohibited by that
Act. (13) I am able to read, write, and speak the English
language (unless exempted therefrom). (14) I am, and
have been during all the periods required by law, a person
of good moral character, attached to the principles of the
Constitution of the United States, and well disposed to the
good order and happiness of the United States. I am will-
ing, if required by law, to bear arms on behalf of the United
States, or to perform noncombatant service in the Armed

organization proscribed by the Immigration and Nationality
Act or any section, subsidiary, branch affiliate, or subdivi-
sion thereof nor have I during such period engaged in or
performed any of the acts or activities prohibited by that
Act. (13) I am able to read, write, and speak the English
language (unless exempted therefrom). (14) I am, and
have been during all the periods required by law, a person
of good moral character, attached to the principles of the
Constitution of the United States, and well disposed to the
good order and happiness of the United States. I am will-
ing, if required by law, to bear arms on behalf of the United
States, or to perform noncombatant service in the Armed
Forces of the United States, or to perform work of national
importance under civilian direction (unless exempted there-
from).

(15) Attached hereto and made a part of this, my petition
for naturalization, are the affidavits of at least two verify-
ing witnesses required by law.I, aforesaid petitioner, do swear (affirm) that I know the
contents of this petition for naturalization subscribed by
me, that the same are true to the best of my knowledge and
belief, and that this petition is signed by me with my full,
true name: **So HELP ME GOD.**Alien Registration No. **A 10 195 771**Sgd. **TAK SHAN FONG**(Full, true, and correct signature of petitioner,
without abbreviation)

CERTIFICATE OF EXAMINATION

I CERTIFY that the petitioner and witnesses named herein
appeared before me and were examined by me prior to the
filing of this petition.Sgd. **N. GEO. PAPADIMAS***U. S. Naturalization Examiner.*

[fol. 14]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 209-210—October Term, 1957.

Argued March 6, 1958

Docket Nos. 24883 and 24420

UNITED STATES OF AMERICA, Respondent-Appellant,

v.

CHAN CHICK SHICK, also known as CHON CHICH SHICK,
Petitioner-Appellee.

UNITED STATES OF AMERICA, Respondent-Appellant,

v.

TAK SHAN FONG, Petitioner-Appellee.

Before: Lumbard, Waterman and Moore, Circuit Judges.

Appeals from orders of the District Court granting petitions for naturalization under 8 U. S. C. A. §1440(a). [fol. 15] Judge Richard H. Levet, Southern District of New York, granted the petition of Chan Chick Shick. Judge Thomas F. Murphy, Southern District of New York, granted the petition of Tak Shan Fong. Reversed. Motion for *en banc* hearing denied.

Roy Babitt, Special Assistant United States Attorney, Southern District of New York, New York, N. Y. (Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y. on the brief), for respondent-appellant.

Abraham Lebenkoff, New York, N. Y. (Jerome J. Coin, New York, N. Y., on the brief), for petitioner-appellee Tak Shan Fong.

PER CURIAM OPINION—March 20, 1958

The appeals in these two cases were heard together as each case presented the same question of law.

Chan Chick Shick, a native and citizen of China, entered the United States at New York City on March 14, 1951 as a member of the crew of the S. S. Oriental Dragon. He was admitted to shore leave on a 29 day pass but remained longer than that period. On February 4, 1952 Chan Chick Shick was deported. He returned to the United States as a seaman on the S. S. Henry Jocelyn on April 1, 1952 and thereafter jumped ship, entered the United States unlawfully and remained in this country until May 4, 1953 when he was inducted into the United States Army. He served in the continental United States and was discharged on May 3, 1955. On August 17, 1955 Chan Chick Shick filed a petition for naturalization which was opposed by the government [fol. 16] on the ground that 8 U. S. C. A. §1440(a)¹ required that the single period of physical presence of at least one year within the United States must commence immediately upon and be a result of the lawful admission. Judge Levet in an opinion dated June 21, 1956, reported at 142 F. Supp. 410 (S. D. N. Y. 1956) rejected this interpretation and granted the petition.

The same objections were raised by the government to the petition of Tak Shan Fong, which was granted without opinion by Judge Murphy, Southern District of New York, by order dated July 23, 1956.

Tak Shan Fong, also a citizen and native of China, had legally entered the United States on April 24, 1951. He

¹ 8 U. S. C. A. §1440(a):

“Notwithstanding the provisions of sections 1421(d) and 1429 of this title, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of this chapter • • •”

departed and on January 27, 1952 he returned to the United States at Newport News, Virginia, as a cabin boy on the S. S. Ocean Star but he was detained aboard ship as a *mala fide* seaman. He escaped from the ship and entered the country illegally, remaining at large for some four months until he was apprehended on June 8, 1952. Deportation proceedings were thereupon instituted and a warrant of deportation was issued, but these proceedings were abated by the induction of the petitioner into the United States Army on May 4, 1953. All his service with the Army took place in the continental United States. [fol. 17] After his discharge from the Army on May 3, 1955, he filed his petition for naturalization on December 22, 1955.

We have recently passed upon the question presented here in *United States v. Boubaris*, 244 F. 2d 98 (2 Cir. 1957) filed subsequent to both of the orders here in question, wherein we held that §1440(a) of 8 U. S. C. A. required that the "single period of at least one year" be immediately consecutive to the lawful admission required by that section. This continuity is concededly lacking in both of the present cases.

The orders appealed from are reversed and remanded with directions to dismiss the petitions.

The panel requesting consideration of these two cases by the entire court, the entire court on the authority of *United States v. Boubaris*, *supra*, unanimously declines such consideration. Chief Judge Clark, however, wishes to be noted as concurring with the views expressed in the dissenting opinion of Judge Hincks in that case, at 244 F. 2d 98, 100.

[fol. 18]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Hon. Sterry R.
Waterman, Hon. Leonard P. Moore, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

TAK SHAN FONG, Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of New York

JUDGMENT—March 20, 1958

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded with directions to dismiss the petition in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk.

[fol. 20] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 21]

SUPREME COURT OF THE UNITED STATES

No. 110, October Term, 1958

TAK SHAN FONG, Petitioner,

VS.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT. U. S.

Office - Supreme Court, U.S.
FILED

JUN 16 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. ~~1000~~ 110

In the Matter of the Application
of

TAK SHAN FONG,

Petitioner.

TAK SHAN FONG,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

WILLIAM B. MAHONEY,
Attorney for Petitioner,
Buffalo, New York.

INDEX.

	PAGE
Petition for Writs of Certiorari to the United States Court of Appeals for the Second Circuit	1
(A) Opinions Below	2
(B) Jurisdiction of the Supreme Court	2
(C) Questions Presented	2
(D) The Statutory Provisions Involved	3
(E, G) Statement of the Case	3
(H) Reasons for Granting the Writ	5
Conclusion	10
Appendix A	11
Opinion Below	11

CASES CITED.

Appolonio, Petition for Naturalization of, 128 F. Supp. 288	5, 9
Boubaris, Petition for Naturalization of, 134 F. Supp. 613	6, 7, 9
Chan Chick Shick, Petition for Naturalization of, 142 F. Supp. 410	7, 9, 13
Tchakalian, Manuel, Petition for Naturalization of, 146 F. Supp. 501	5
United States v. Boubaris, 244 F. 2d 98 (2nd Cir.) ..	5, 8, 13, 14
United States v. Chan Chick Shick, Appendix A	8
United States v. Tak Shan Fong, Appendix A	9
Zaino, Petition for Naturalization of, 131 F. Supp. 456.	6, 9

STATUTES.

Title 8, Section 1440a, U. S. C. A.....	2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No.

In the Matter of the Application
of

TAK SHAN FONG,

Petitioner.

TAK SHAN FONG,

Petitioner,

VS.

THE UNITED STATES OF AMERICA.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Your petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit, dated March 20, 1958, which reversed a final order of the District Court for the Southern District of New York, which latter Court granted the petition of Tak Shan Fong for naturalization as a United States citizen.

A formal decree admitting petitioner to citizenship was granted and entered in the District Court for the Southern District of New York (Hon. Thomas F. Murphy, D.J.)

on July 23, 1956. The judgment of reversal by the Court of Appeals directed that the case be remanded with direction to vacate the order and deny the petitioner's application for citizenship.

(A) Opinions Below.

The District Court did not render an opinion. The opinion of the Court of Appeals has not been officially reported. A copy thereof is hereby appended as Appendix A (pp. 11-14).

(B) Jurisdiction.

The jurisdiction of the Supreme Court of the United States is invoked upon the following grounds:

(i) The judgment of the Court of Appeals was dated and entered March 20, 1958.

(ii) No order has been granted for a rehearing, nor has there been any order granted extending the time, within which, to petition for certiorari.

(iii) The jurisdiction of this Court to review the judgment herein by Writ of Certiorari is conferred under Sections 1 and 2 of Article III of the Constitution of the United States; Section 1254(1) of Title 28, U. S. C.; Section 2101(c) of Title 28, U. S. C., and Rule 19(1)(b) of the Rules of the Supreme Court of the United States.

(C) Questions Presented.

Is an applicant for naturalization under Public Law 86-83rd-Congress (1952), 8 U. S. C. A. 1440a, required to prove that his physical presence within the United States followed directly his lawful admission to the United States? .

Does the statute, 8 U. S. C. A. 1440a, demand that lawful admission and physical presence sequence be immediately consecutive?

(D) Statute Involved.

Public Law 86, 83rd Congress, 67 Stat. 108, 8 U. S. C. § 1440a.

“§ 1440a. Naturalization through active service in the armed forces after June 29, 1950; requirements and exceptions; proof of service

Notwithstanding the provisions of sections 1421(d) and 1429 of this title, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of this chapter, except that— * * * ”

(E, G) Statement of the Case.

Petitioner Tak Shan Fong, a seaman and a native and citizen of China, *lawfully* entered the United States at Honolulu, Territory of Hawaii, on August 24, 1951. Shortly thereafter he departed on the vessel that brought him to Hawaii. Thereafter, and on January 27, 1952, he arrived at Newport News, Virginia, aboard the S. S. Ocean Star, upon which he was employed as a cabin boy. He requested and was granted shore leave. Upon returning to his ship he learned that it had departed from Newport News,

Virginia. The certificate of arrival as to petitioner designated that he was a deserting seaman. On June 8, 1952 he was apprehended, subsequently accorded a hearing, and a warrant of deportation was issued. He was inducted into the armed forces of the United States on May 4, 1953 and because of such induction the deportation proceedings abated. The petitioner served in the armed forces of the United States until May 3, 1955 and was honorably discharged from the United States Army.

Petitioner filed a petition for naturalization under Public Law 86, 83rd Congress, 67 Stat. 108; 8 U. S. C. § 1440a.

The Government, in opposing the petition, initially asserted that the petitioner had not made a lawful entry into the United States. Later, the Immigration and Naturalization Service learned that petitioner had lawfully entered the United States at Honolulu, Territory of Hawaii, on August 24, 1951 and departed therefrom prior to his entrance into the United States at Newport News, Virginia on or about January 27, 1952.

In Judge Murphy's findings of fact it was stated:

"Petitioner has been lawfully admitted to the United States, to wit, at the Port of Honolulu, T. H., on August 24, 1951."

The Government then adopted the theory that lawful admission and physical presence sequence must be immediately consecutive, and that the petitioner's entry into the United States in January 1952 being allegedly unlawful, the petitioner had not met the requirements of the statute.

Judge Murphy directed that the petition for naturalization should be granted and an order to that effect was signed and entered July 23, 1956. On the same day the petitioner took the Oath of Allegiance and the certificate admitting petitioner to citizenship was issued. The order

of Judge Murphy was reversed by the Court of Appeals, Second Circuit, on March 20, 1958. The order of reversal directed that the order admitting petitioner to citizenship should be vacated and petitioner's application for citizenship should be denied.

(H) Reasons for Granting Writ.

The question involved in this case presents a substantial and important question of federal law which has not been, but should be, settled by this Court. Considerable conflict of opinion exists among the District Court Judges for the Southern District of New York, as well as among the Judges of the Court of Appeals for the Second Circuit, as to what constitutes compliance with the requirements of 8 U. S. C. § 1440a in order to justify either the granting or denial of a petition of naturalization. The decision of the Court of Appeals, Second Circuit, in *United States v. Boubaris*, 244 F. 2d 98, as well as the decision of the same Court in our present case, is also in conflict with *Petition for Naturalization of Manuel Tchakalian*, (California) 146 F. Supp. 501.

In *United States v. Boubaris (supra)*, Judge Hincks dissented (with opinion at pages 100-101). In our present case Chief Judge Clark was noted as concurring with the views expressed in the dissenting opinion of Judge Hincks in the *Boubaris* case (App. p. 13).

In the earliest reported case on the construction of this statute, *In Re Appolonio*, 128 F. Supp. 288, the petitioner, a seaman, overstayed his leave in 1947 and remained in the United States without legal authority to remain. In 1951 he was inducted into the United States Army; in 1952 he was arrested on a warrant in a deportation proceeding. A hearing was held and petitioner was paroled. He was

then shipped overseas and in 1953 was honorably discharged from the United States Army. In February, 1953 he was granted a hearing in the deportation proceedings and was found deportable. He then sought naturalization pursuant to Section 1440a of Title 8 U. S. C. The Government contended that he was not "lawfully" admitted within the meaning of the statute.

The Government's contention was rejected and his petition for naturalization was approved. No appeal was taken.

The Government asserted another theory for denial of naturalization to a person who served in the armed forces of the United States in *Petition for Naturalization of Zaino*, 131 F. Supp. 456, June 10, 1955. The petitioner was erroneously admitted to the United States in 1929; he served in the United States Army from 1950 to 1952 and was honorably discharged. He served part of his army service in Korea. The Government contended that his *lawful admission* to the United States must precede his year's physical presence and his entry into the armed forces.

The Government's contention was again rejected, Judge Dimock stating at page 457:

"The statute, as literally read, makes no such requirement."

Still another theory, and a theory directly involved in our present case, was projected by the Government in *In Re Petition for Naturalization of Demetrios Boubaris*, 134 F. Supp. 613*, Sept. 20, 1955. In such case, petitioner entered this country lawfully on a seaman's pass and thereafter departed. Later he re-entered this country unlawfully. He was inducted into and served in the United States Army and was honorably discharged. He petitioned for naturalization, and the Immigration Service recom-

* Reversed 244 F. 2d 98 by divided Court.

mended denial on the ground that the single period of physical presence did not follow upon a lawful admission. This theory was rejected by Judge Edelstein and the petition was granted. The Government appealed from this order.

During the time that the appeal in the aforesaid case was pending, Chan Chick Shick applied for naturalization pursuant to the provisions of Section 1440a of Title 8 U. S. C. The petitioner entered the United States lawfully on a seaman's pass, stayed beyond the period designated in such pass, and was served with a warrant for deportation. A hearing was held and he was deported in February 1952; he returned in April 1952 and unlawfully entered the country. He remained in the United States until May 1953 when he was inducted into the United States Army wherein he served for two years and was honorably discharged in May 1955. The Government interposed the identical contention as made in the *Boubaris* case (*supra*). This was overruled by Judge Levet in *Petition for Naturalization of Chan Chick Shick, also known as Chon Chich Shick*, 142 F. Supp. 410*, June 21, 1956, wherein he said at page 412:

"In view of the liberal manner in which the Courts have interpreted 8 U. S. C. A. § 1440a, it is the opinion of this Court that the statutory period of physical presence need not commence immediately after the petitioner's lawful entry. Having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time he entered the Armed Forces, petitioner may be naturalized pursuant to the statute in question."

As heretofore noted, the Government appealed from the order granting the petition of *Boubaris* (*supra*). The case

* Rev. opinion not reported. Appendix "A".

was argued before Judges Hincks, Lumbard and Waterman. The order of Judge Edelstein was reversed by a divided Court, with Judge Hincks delivering an opinion for affirmance (244 F. 2d, 98-100)*. Judge Lumbard, in writing for the majority for reversal, said at page 100:

“The only fair construction of the statute requires that the lawful admission and physical presence sequence be immediately consecutive.”

In contrast, Judge Hincks, in his opinion for affirmance, said at page 100:

“Judge Edelstein found, and no one disputes, that in this case there was a literal compliance with the requirements of 8 U. S. C. A. § 1440a and granted the petition for naturalization. The Government appeals, however, on the ground—as stated in its brief—that the Act, *although it does not say so*, should be interpreted to require ‘that the one year physical presence must directly follow a lawful admission to the country’.” (Italics supplied)

Approximately one year subsequent to the Court’s reversal in *U. S. v. Boubaris*, our present case and that of Chan Chick Shick were heard together with two of the same Judges, namely, Judges Lumbard and Waterman, sitting, who had heard the argument and decided the case of *U. S. v. Boubaris* (Appendix A). The “*Per Curiam*” opinion for reversal merely stated:

“We have recently passed upon the question presented here in *United States v. Boubaris*, 244 F. 2d 98 (2 Cir. 1957) filed subsequent to both of the orders here in question, wherein we held that § 1440(a) of 8 U. S. C. A. required that the ‘single period of at least one year’ be immediately consecutive to the lawful admission required by that section. This continuity is concededly lacking in both of the present cases.” (Appendix A, p. 13).

* Judges Lumbard and Waterman, with Judge Moore, heard the argument on the appeal of *U. S. v. Chan Chick Shick* and our present case (Appendix A).

In this latter opinion, the following appears at App. p. 14:

“The panel requesting consideration of these two cases by the entire court, the entire court on the authority of *United States v. Boubaris, supra*, unanimously declines such consideration. Chief Judge Clark, however, wishes to be noted as *concurring* with the views expressed in the *dissenting* opinion of Judge Hincks in that case, at 244 F. 2d 98, 100.” (Italics supplied.)

We are confronted with a question as to the correct interpretation of the provisions of a Federal statute, namely, § 1440a, 8 U. S. C. A.

In *Re Appolonio (supra)* and *Petition of Zaino (supra)*, Judges Dawson and Dimock, of the Southern District of New York, rejected the construction of § 1440a of Title 8 U. S. C. A. as urged by the Government. The main difference between the aforesaid cases and our present case was that both petitioners in such cases had served overseas and had re-entered the United States as members of the United States Army.

In the *Boubaris*, *Chan Chick Shick*, and *Fong* cases (*supra*), Judges Edelstein, Levet and Murphy placed an interpretation on the statute that lawful entry and physical presence did not have to occur consecutively. In the same cases; Judges Lombard and Waterman held to the contrary. In the *Boubaris* case, Judge Hincks agreed with Judge Edelstein's interpretation of the statute and disagreed with Judges Lombard and Waterman. In *Chan Chick Shick* and our present case (*Fong*), Chief Judge Clark concurred in the dissenting opinion of Judge Hincks in the *Boubaris* case.

There appears to be a decided unanimity of opinion by the District Court Judges for the Southern District of New York as to the interpretation to be placed upon

§ 1440a, Title 8 U. S. C. A. Such opinions are directly opposite to those of Judges Lumbard, Waterman and Moore of the Court of Appeals for the Second Circuit. Finally, Chief Judge Clark and Associate Judge Hincks are in accord with the interpretation resolved by the District Court Judges and in definite conflict with their associate Judges, Lumbard, Waterman and Moore.

CONCLUSION.

Petitioner respectfully submits that this case involves an important Federal question as to the correct interpretation of a statute, § 1440a, Title 8 U. S. C. A., which should be settled by this Court. That the Court of Appeals, by its decision, has read into this statute a provision which is not contained in the statute, and which provision was not within the contemplation of Congress at the time of the enactment of such statute. This Court's interpretation is essential and necessary for the guidance of District Courts and Courts of Appeal in similar cases arising in those Courts in the future.

Respectfully submitted,

WILLIAM B. MAHONEY,
Counsel for Petitioner.

Buffalo, New York,
June , 1958.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 209-210—October Term, 1957.

(Argued March 6, 1958 Decided March 20, 1958.)
Docket Nos. 24883 and 24420

UNITED STATES OF AMERICA,
Respondent-Appellant,
v.

CHAN CHICK SHICK, also known as CHON CHICK SHICK,
Petitioner-Appellee.

UNITED STATES OF AMERICA,
Respondent-Appellant,
v.

TAK SHAN FONG,
Petitioner-Appellee.

Before:

LUMBARD, WATERMAN and MOORE,
Circuit Judges.

Appeals from orders of the District Court granting petitions for naturalization under 8 U. S. C. A. § 1440(a). Judge Richard H. Levet, Southern District of New York, granted the petition of Chan Chick Shick. Judge Thomas F. Murphy, Southern District of New York, granted the petition of Tak Shan Fong. Reversed. Motion for *en banc* hearing denied.

ROY BABITT, Special Assistant United States Attorney, Southern District of New York, New York, N. Y. (Paul W. Williams, United State Attorney, Southern District of New York, New York, N. Y. on the brief), *for respondent-appellant.*

ABRAHAM LEBENKOFF, New York, N. Y. (Jerome J. Coin, New York, N. Y. on the brief), *for petitioner-appellee Tak Shan Fong.*

PER CURIAM:

The appeals in these two cases were heard together as each case presented the same question of law.

Chan Chick Shick, a native and citizen of China, entered the United States at New York City on March 14, 1951 as a member of the crew of the S. S. Oriental Dragon. He was admitted to shore leave on a 29 day pass but remained longer than that period. On February 4, 1952 Chan Chick Shick was deported. He returned to the United States as a seaman on the S. S. Henry Jocelyn on April 1, 1952 and thereafter jumped ship, entered the United States unlawfully and remained in this country until May 4, 1953 when he was inducted into the United States Army. He served in the continental United States and was discharged on May 3, 1955. On August 17, 1955 Chan Chick Shick filed a petition for naturalization which was opposed by the government on the ground that 8 U. S. C. A. § 1440(a)¹ requir-

¹ 8 U. S. C. A. § 1440(a) :

"Notwithstanding the provisions of sections 1421(d) and 1429 of this title, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully ad-

(Footnote continued on following page)

ed that the single period of physical presence of at least one year within the United States must commence immediately upon and be a result of the lawful admission. Judge Levet in an opinion dated June 21, 1956, reported at 142 F. Supp. 410 (S. D. N. Y. 1956) rejected this interpretation and granted the petition.

The same objections were raised by the government to the petition of Tak Shan Fong, which was granted without opinion by Judge Murphy, Southern District of New York, by order dated July 23, 1956.

Tak Shan Fong, also a citizen and native of China, had legally entered the United States on April 24, 1951. He departed and on January 27, 1952 he returned to the United States at Newport News, Virginia, as a cabin boy on the S. S. Ocean Star but he was detained aboard ship as a *mala fide* seaman. He escaped from the ship and entered the country illegally, remaining at large for some four months until he was apprehended on June 8, 1952. Deportation proceedings were thereupon instituted and a warrant of deportation was issued, but these proceedings were abated by the induction of the petitioner into the United States Army on May 4, 1953. All his service with the Army took place in the continental United States. After his discharge from the Army on May 3, 1955, he filed his petition for naturalization on December 22, 1955.

We have recently passed upon the question presented here in *United States v. Boubaris*, 244 F. 2d 98 (2 Cir. 1957) filed subsequent to both of the orders here in question, wherein we held that § 1440(a) of 8 U. S. C. A. re-

(Footnote continued from preceding page)

mitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of this chapter * * *

quired that the "single period of at least one year" be immediately consecutive to the lawful admission required by that section. This continuity is concededly lacking in both of the present cases.

The orders appealed from are reversed and remanded with directions to dismiss the petitions.

The panel requesting consideration of these two cases by the entire court, the entire court on the authority of *United States v. Boubaris, supra*, unanimously declines such consideration. Chief Judge Clark, however, wishes to be noted as concurring with the views expressed in the dissenting opinion of Judge Hincks in that case, at 244 F. 2d 98, 100.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 110

TAK SHAN FONG,

Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER, TAK SHAN FONG

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INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Summary of argument	4
Argument:	
I. The statute, 8 U. S. C. 1440a, was designed to reward aliens who had honorably served in the Armed Forces of the United States during the Korean conflict. Such statute did not provide that lawful admission and physical presence sequence be immediately consecutive. The obvious purpose of Congress should not be disregarded	5
II. The statute should be liberally construed in favor of petitioner. Any ambiguity should be resolved in favor of lenity	10
Conclusion	12

CITATIONS.

Cases:

Bell v. United States, 349 U. S. 81; 75 S. Ct. 620....	10
Bonetti v. Rogers, 78 S. Ct. 976	10
Fong Haw Tan v. Phelan, 333 U. S. 6; 68 S. Ct. 374...	11
United States v. Boubaris, 244 F. 2d. 98.....	4, 8, 9

United States Statutes:

Immigration and Nationality Act, Sec. 318 (now Sec. 1429) 8 U. S. C. A. 1429	7, 10
Mann Act, 18 U. S. C. 2421	10
8 U. S. C. 155(a)	11

II.

PAGE

8 U. S. C. 1440a	2, 3, 4, 5, 10
8 U. S. C. 392b, 47 Stat. 165, 54 Stat. 1174	9
28 U. S. C. 1254(1)	1

Miscellaneous:

H. Rep. No. 223, 83rd Congress—1st Session	6, 7
S. Rep. No. 378, 83rd Congress—1st Session	7

IN THE
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OCTOBER TERM, 1958

No. 110

TAK SHAN FONG,

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UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER, TAK SHAN FONG

Opinion Below

The opinion of the United States Court of Appeals, Second Circuit, is officially reported in 254 F. 2d 4.

Jurisdiction

The judgment of the Court of Appeals was entered March 20, 1958 (R. 15). The petition was filed June 16, 1958 and was granted October 13, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

May an alien who had been lawfully admitted to the United States and subsequently departed, and who there-

after entered unlawfully, be naturalized under 8 U. S. C. 1440a(2) provided he complied with all the additional requirements of such statutory provision?

Must the single period of physical presence, required by the statute, commence immediately after lawful entry?

Statute Involved

“§ 1440a. Naturalization through active service in the armed forces after June 29, 1950; requirements and exceptions; proof of service

Notwithstanding the provisions of sections 1421 (d) and 1429 of this title, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of this chapter, except that—* * *.” 8 U. S. C., p. 266.

Statement

Petitioner, a native and citizen of China, was lawfully admitted to Honolulu, T. H., as a seaman, on August 24, 1951⁽¹⁾. He remained there for 29 days and departed. On January 27, 1952 he entered the United States at Newport News, Virginia. He was detained on board as a person inadmissible as a bona fide seaman. Official records show he deserted the vessel and escaped (R. 7, 11).

⁽¹⁾ This information is contained in Department of Justice file.

On June 8, 1952 he was apprehended and was accorded a hearing in deportation proceedings. He testified that he did not see any immigration officers aboard the vessel, and left such vessel two days after arrival, without permission. He also testified that after securing permission to leave the ship from an officer, he departed for New York; that when he returned four days later the vessel upon which he arrived had departed (R. 8). On January 15, 1954 he was ordered deported but the delivery bond was cancelled by the Immigration Service upon learning that petitioner had been inducted into the United States Army on May 4, 1953 (R. 8). Petitioner served in the United States Army until May 3, 1955 when he was honorably discharged. All his service was within the United States (R. 8).

A petition for naturalization, pursuant to 8 U. S. C. 1440a, was filed by Tak Shan Fong in the United States District Court for the Southern District of New York on December 22, 1955, wherein it was stated that he was lawfully admitted to the United States in 1952 (R. 2). At the hearing before the Court, the Naturalization Examiner, in his Findings of Fact, stated that petitioner did serve on an active duty status in the Armed Forces of the United States and was honorably released (R. 9). He recommended denial of the petition on the ground that the petitioner had failed to establish lawful admission to the United States (R. 10).

United States District Judge Murphy disapproved the recommendation of the Naturalization Examiner and made new findings of fact and conclusions of law, among which it was stated that "petitioner had been lawfully admitted to the United States, to wit, at the Port of Honolulu, T. H.,

on August 24, 1951." The petition for naturalization was granted (R. 4, 5).

The Court of Appeals reversed *per curiam*. The reversal was based on the Court's previous decision in *United States v. Boubaris*, 244 F. 2d 98 (2 Cir., May 8, 1957). Therein, by a divided Court, it was held that 8 U. S. C. 1440a "required that the 'single period of at least one year' be immediately consecutive to the lawful admission required by that section. This continuity is concededly lacking in both of present cases" (R. 14).⁽²⁾

Summary of Argument

The section, namely 1440a of the United States Code, was enacted for the sole purpose of rewarding certain aliens who rendered honorable service to our country during the Korean conflict. Congress did not provide that lawful admission and physical presence sequence must be immediately consecutive. The majority of the Court of Appeals erred in the judicial interpretation it placed upon such statute.

The ambiguity of the statute, coupled with the conduct of the Selective Service and the Immigration and Naturalization Service, requires a construction in favor of petitioner.

⁽²⁾ An *en banc* hearing was denied; Judge Frank agreed with dissent in *U. S. v. Boubaris*. Petitioner's appeal was heard with another appeal by one Chan Chick Shick.

ARGUMENT

I

The statute, 8 U. S. C. 1440a, was designed to reward aliens who had honorably served in the armed forces of the United States during the Korean conflict. Such statute did not provide that lawful admission and physical presence sequence be immediately consecutive. The obvious purpose of Congress should not be disregarded.

It is conceded by the Government that the petitioner, in seeking to be naturalized as a citizen of the United States, measures up to the requisites of 8 U. S. C. 1440a, as to (a) being a person of good moral character; (b) attached to the principles of the Constitution of the United States; (c) well disposed to the good order and happiness of the United States; (d) having been physically present in the United States for a single period of one year at the time of entering the armed forces of the United States, and finally that he served in the United States Army from May 4, 1953 to May 3, 1955, and was *honorably* discharged therefrom.

It is further conceded that the petitioner was lawfully admitted to the United States at Honolulu, T. H., in 1951. Further, that petitioner arrived at Newport News, Virginia, on July 12, 1952. At this juncture, the Government claims the petitioner, without permission, left his ship; the petitioner claims he had permission for shore leave, and that his vessel, departed before his return to where the ship was berthed.

The Government contends that the phraseology of the statute "having been lawfully admitted to the United

States and having been physically present within the United States for a single period of at least one year at the time of entering the armed forces," must be construed as meaning that the single period of physical presence must immediately follow a lawful entry.

The statute does not so provide. An examination and construction of the statute becomes necessary. The first essential query that asserts itself, relates to the purpose sought to be accomplished by Congress in enacting such statute. What was the intent of Congress? Did the legislators have in mind a reward, to those aliens who had honorably served in the armed forces of this Nation, with subtle technical reservations? Contrariwise, were they desirous of extending to all such aliens, lawfully admitted on any previous occasion, who rose to the defense of the United States at the time of the Korean conflict, an unqualified award for such military service, honorably accomplished, providing all other requisites were present?

Partial answer is found in House Report 223⁽¹⁾, under "Purpose of Bill". Such purpose was "the expeditious naturalization of aliens lawfully admitted into the United States as immigrants or non-immigrants * * *." Nowhere is there any indication of an intent that lawful entry must immediately precede physical presence within the United States for a single period of one year at the time of entering the armed forces. The fact that such a requirement is not contained in the asserted "Purpose of Bill", as set forth in the House Report, supports petitioner's contention that Congress did not intend that the lawful admission and physical presence sequence be immediately consecutive.

⁽¹⁾ House Report, No. 223, 83rd Congress—1st Session, 1953; dated March 30, 1953.

Again in the House Report (*supra*) Congressman Graham reported as to whom were excluded; namely, subversives, conscientious objectors, those discharged under other than honorable conditions, or those discharged on their own application because of alienage. Petitioner is not included in any of the classes of exclusion, so designated. It may be true that such enumerated classes are not all inclusive. It is also true, that if it were the intention of Congress to exclude persons in the category of the petitioner, it would have been a simple undertaking to have included those persons in the "exclusionary provisions."

Added weight to petitioner's argument is found in the rejection, by both the House of Representative's Report (*supra*) and the Senate Report⁽²⁾, of the recommendations made by William P. Rogers, Deputy Attorney General, to the effect that servicemen should be required to have lawful status at the time of entering the armed forces. Such recommendation concerned itself with compelling the servicemen, who sought naturalization pursuant to the statute, to bear the burden of proof, as then required by Section 318 of Immigration and Nationality Act (now Section 1429). The expressed reaction of the Committee, not only manifested its disdain for "technicalities involved in the continuance of lawful status", but added that such recommendation would, "practically nullify the purpose of the legislation."

It must be assumed that Congress was aware of the burden of proof rule in Section 318. Under such section, any person had to show that he *entered the country lawfully*. By its action in rejecting the aforesaid recommenda-

⁽²⁾ The Senate, 83d. Congress, First Session, Calendar #380; Report #378.

tions, Congress exhibited an intention that it was not concerned with imposing any burden of proving lawful entry, upon those whom it intended to reward for faithful and honorable service in the armed forces of the United States during the Korean conflict. In fact, too clearly emphasize its intention, Congress specifically enacted in this statute, "Notwithstanding the provisions of sections * * * and 1429 of this title * * *." Such phraseology is a clear indication that Congress, not only eliminated that part of Section 318 referring to the burden of proof as to a lawful entry into the country, but also all other provisions of such section.

The majority of the Court of Appeals, 2nd Circuit, said in *Boubaris* (*supra*, at 100):

"Where Congress has meant an unlawful admission to be no bar to naturalization, it has specifically so provided. See e. g. U. S. C. A. Sec. 1001 (1946 edition) 58 Stat. 886, 887 (1944); where the language is: '* * * being unable to establish lawful admission into the United States,' and also 8 U. S. C. A. Sec. 1440 (1952), which contains similar language."

Although it may be conceded that the prototype of this Act, containing special legislation for non-citizens who served in World War I or World War II, were somewhat more liberal, such factor does not warrant nor justify the majority decision in *Boubaris* (*supra*) nor the adoption of such contention by the Government in this case. Our present question concerns the intention of Congress, at the time of the enactment of this Act. What may have been done at previous sessions of Congress, may lend aid in interpretation, but the same is never decisive nor controlling. More important, is the purpose, which Congress was endeavoring to accomplish, as well as the actual content of the statute. This was a rewarding statute, designed

to recognize this Nation's gratitude for service rendered to it, by aliens in an honorable manner.

Further, the lack of specific provisions in the Act, clearly spelling out the Government's claimed construction, supports petitioner's reasoning that Congress did not intend such an interpretation. If Congress had intended the construction, as urged by the Government, it could have used language comparable to that which it had used in 8 U. S. C. 392b, 47 Stat. 165; 54 Stat. 1174. That Act provided:

"Sec. 392b. Alien veterans residing in United States, etc.

(a). An alien veteran, as defined in Section 241 of this title, shall, if residing in the United States, be entitled at any time prior to May 25, 1940, to naturalization upon the same terms, conditions and exemptions which would have been accorded to such alien if he had petitioned before the armistice of the World War except that (1) such alien shall be required to prove that *immediately* preceding the date of his petition he has resided continuously within the United States for at least two years, in pursuance of a *legal admission* for permanent residence * * *."

In such statute the intent of Congress as to time and calibre of entry was specified by the particular words "immediately" and "legal admission." If Congress intended, in our present Act, that physical presence for a single year must immediately follow a lawful entry, it would have used similar language to that used in section 392b (*supra*); namely, that "such residence must immediately follow lawful admission."

Judge Hincks in Boubaris (*supra*) in writing for affirmance of the lower Court's order granting naturalization, aptly stated at page 100:

"The structure of 1440 a is so simple that Congress must have realized that the language used failed to

provide continuity between the lawful admission and 'single period of at least one year'."

The petitioner, having been admitted to the United States as a non-immigrant; having resided in the United States for a single period of a year before induction into the Armed Forces; having served in said Armed Forces for two years and being honorably discharged therefrom; and being a person of good moral character, is entitled to become a naturalized citizen of the United States pursuant to the provisions of 8 U. S. C. 1440a.

II

The statute should be liberally construed in favor of petitioner. Any ambiguity should be resolved in favor of lenity.

In *Bell v. United States*, 349 U. S. 81; 75 S. Ct. 620, the Court was confronted with the problem as to whether petitioner committed but a single offense in the transportation of two women on the same trip in the same vehicle, or whether he was subject to consecutive terms under each count of the indictment, under the Mann Act, 18 U. S. C. 2421. In resolving the ambiguity of the statute in favor of petitioner, it was said at page 622:

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

This same principle was cited with approval in a deportation proceeding under the Immigration and Nationality Act, in *Bonetti v. Rogers*, 78 S. Ct. 976 at 981.

The application of such principle acquires additional significance when we consider that at the time petitioner was drafted, the Selective Service personnel knew of the fact that petitioner was an alien. Further, the Immigration and Naturalization Service knew that petitioner had been induced into the armed forces and the only action which such Service employed, at such time, was to cancel the delivery bond (R. 8). The Selective Service then allowed petitioner to continue serving in the armed forces of the United States from January 15, 1954, until the date of his honorable discharge on May 3, 1955.

While it is true that the members of the Immigration and Naturalization Service cannot waive the provisions of the statute. However, the failure of the Immigration and Naturalization Service to take prompt action to secure his release from military service and carry out the deportation order, should weigh heavily against their present assertion that the petitioner should be denied the relief he seeks under this statute.

In *Fong Haw Tan v. Phelan*, 333 U. S. 6, 68 S. Ct. 374, Justice Douglas, in resolving an interpretation of 8 U. S. C. 155(a) in favor of the alien, said at page 376:

"We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U. S. 388, 68 S. Ct. 10. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statute less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

In such case, the forfeiture involved was the residence of an alien in this country. The Court's construction of

the statute, concededly, was generous towards the alien inasmuch as he was a convicted murderer. In our present case, the forfeiture attempted by the Government is not only the deprivation of petitioner's status as a naturalized citizen, resulting in subsequent deportation, but calls for such a drastic construction against petitioner who in good faith gave honorable and devoted service to the United States in the Korean crisis.

CONCLUSION

For the reasons stated it is respectfully submitted that the order of the Circuit Court of Appeals should be reversed and that of the District Court reinstated.

Respectfully submitted,

WILLIAM B. MAHONEY,
Attorney for Petitioner.

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No. 110

In the Supreme Court of the United States

OCTOBER TERM, 1958

TAK SHAN FONG, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE HANKIN,

Solicitor General,

MALCOLM ANDERSON,

Assistant Attorney General,

BEATRICE ROSENBERG,

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INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	1
Statute involved.....	2
Statement.....	2
Argument.....	4
Conclusion.....	7

CITATIONS

Cases:

<i>Apolloni, In re</i> , 128 F. Supp. 288.....	6
<i>Bonetti v. Rogers</i> , No. 94, Oct. Term, 1957, decided June 2, 1958.....	5
<i>Brymer v. United States</i> , 83 F. 2d 276.....	5
<i>Tchakalian's Petition, In re</i> , 146 F. Supp. 501.....	6
<i>United States v. Boubaris</i> , 244 F. 2d 98.....	4, 5, 6
<i>Werblow v. United States</i> , 134 F. 2d 791.....	5

Statutes:

Act of June 30, 1953, ch. 162, § 1, 67 Stat. 108, 8	
U. S. C. (Supp. V) 1440a.....	2, 3, 4, 6
8 U. S. C. 1251 (a) (9).....	6

Miscellaneous:

H. Rep. No. 223, 83rd Cong., 1st Sess., p. 2.....	5
S. Rep. No. 378, 83rd Cong., 1st Sess., p. 2.....	5

(1)

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OPINION BELOW

The opinion of the Court of Appeals (R. 14a-17a; Pet. App. A 11-14) is reported at 254 F. 2d 4. The findings of fact and conclusions of law of the District Court appear at R. 4a-5a.

JURISDICTION

The judgment of the Court of Appeals was entered March 20, 1958 (R. 18a). The petition for a writ of certiorari was filed on June 16, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an alien whose year of physical residence in the United States followed an unlawful entry in

1952 may be naturalized under 8 U. S. C. (Supp. V) 1440a (2) on the basis that he had on a previous occasion been lawfully admitted for 29 days as a seaman and had subsequently departed from the United States.

STATUTE INVOLVED

The Act of June 30, 1953, ch. 162, § 1, 67 Stat. 108, 8 U. S. C. (Supp. V) 1440a provides in pertinent part:

Notwithstanding the provisions of sections 310 (d) and 318 of the Immigration and Nationality Act, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of the Immigration and Nationality Act, except that— * * *

STATEMENT

Petitioner, a native and citizen of China, last entered the United States on January 27, 1952, at Newport News, Virginia, as a seaman. He was ordered detained on board as a mala fide seaman. He escaped and took employment ashore (R. 9a). On June 8, 1952, he was apprehended and after a hearing was

ordered deported by warrant dated January 15, 1954 (R. 9a-10a). On May 4, 1953, he was inducted into the United States Army. He served in the continental United States until May 3, 1955, when he was honorably discharged (R. 10a).

On December 22, 1955, he filed his petition for naturalization under 8 U. S. C. (Supp. V) 1440a, *supra*, p. 2, in the District Court for the Southern District of New York, in which he alleged that he was lawfully admitted to the United States in 1952 (R. 3a). At the hearing before the court, the Immigration and Naturalization Service recommended denial of the petition on the ground that his entry into the United States in 1952, the only entry discussed by the Naturalization Examiner, was unlawful (R. 9a-12a). Petitioner's attorney then notified the court that petitioner had been admitted to Honolulu, T. H., on two occasions prior to 1952. On August 24, 1951, he had been admitted at Honolulu as a seaman for 29 days and had departed with his ship. On October 15, 1951, at Honolulu, he was ordered detained on board ship. The Immigration and Naturalization Service verified these prior entries but opposed the petition because his last entry, *i. e.*, the one in 1952 which resulted in his year's presence in the United States, was illegal.¹ In his findings of fact and conclusions of law, the district judge found that petitioner had been lawfully admitted to the United States on August 24, 1951, at Honolulu, T. H., and granted his petition for naturalization (R. 4a-5a).

¹ This information has been obtained from the Department of Justice file.

On appeal, the Court of Appeals reversed *per curiam*. It based its holding upon its previous decision in *United States v. Boubaris*, 244 F. 2d 98, in which it had held, with one judge dissenting, upon facts similar to those involved here, that 8 U. S. C. 1440a "required that the 'single period of at least one year' be immediately consecutive to the lawful admission required by that section." Such continuity was found lacking here (R. 14a-17a).²

ARGUMENT

Petitioner contends that his lawful entry to Honolulu, T. H., on August 24, 1951, for 29 days, makes him eligible for citizenship under 8 U. S. C. (Supp. V) 1440a, *supra*, even though his physical presence within the United States "for a single period of at least one year at the time of entering the Armed Forces" was not in any way connected with that legal entry, but rather followed his 1952 entry which was wholly illegal. This contention is not supported by the language of the statute, its history, or common sense.

8 U. S. C. (Supp. V) 1440a (2), by providing in one subsection for the naturalization of aliens who have "been lawfully admitted to the United States, *and* having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces" (emphasis added), requires that the physical presence must follow a lawful entry. Any other interpretation would mean that Congress, when it passed 8 U. S. C. (Supp. V) 1440a,

² Petitioner's motion for an *en banc* hearing was denied, with Chief Judge Clark noting that he agreed with the view of the dissent in *Boubaris*.

had in mind that it would apply to aliens who were in the country in violation of the immigration laws. The Committee reports (S. Rept. No. 378, p. 2, and H. Rept. No. 223, p. 2) (83d Cong., 1st Sess.) accompanying the bill which was finally enacted as 8 U. S. C. (Supp. V) 1440a state to the contrary that the act "contemplated benefits *only* for the alien who has effected lawful entry, either in an immigrant or non-immigrant status" (emphasis added). As the majority of the Second Circuit Court of Appeals said in *Boubaris* (*supra*, at 100):

Where Congress has meant an unlawful admission to be no bar to naturalization, it has specifically so provided. See e. g. 8 U. S. C. A. § 1001 (1946 edition) 58 Stat. 886, 887 (1944); where the language is: "* * * being unable to establish lawful admission into the United States," and also 8 U. S. C. A. § 1440 (1952), which contains similar language.

After petitioner left the United States with his vessel in 1951, his nonimmigrant status terminated—it was abandoned. (See *Bonetti v. Rogers*, No. 94, Oct. Term, 1957, decided June 2, 1958.) His subsequent application for admission in 1952 had no relation to his former lawful admission. He was seeking to effect a new admission. Consequently, his illegal entry—his last actual entry—is the only entry to be considered in connection with his petition for naturalization (cf. *Bonetti v. Rogers*, *supra*; *Brymer v. United States*, 83 F. 2d 276 (C. A. 9); *Werblow v. United States*, 134 F. 2d 791 (C. A. 2)). If, after petitioner's lawful admission in 1951, he had continued to remain in

the United States beyond his 29-day permit, the resultant unlawful status (failing to maintain status, 8 U. S. C. 1251 (a) (9)) would not bar naturalization under Section 1440a (*In re Apollonio*, 128 F. Supp. 288 (S. D. N. Y.)). But certainly Congress did not intend that because an alien had once been lawfully admitted as a nonimmigrant and had then departed, he nevertheless had a permanent status as a lawful immigrant even though his later, unconnected, entry was unlawful.

There is no conflict of circuits on this issue, the Second Circuit being the only one which has had the question for consideration. Decisions to the contrary in the Southern District of New York have been overruled by the holding of the Second Circuit in *United States v. Boubaris*, 244 F. 2d 98, and the instant decision. *In re Tchakalian's Petition*, 146 F. Supp. 501 (N. D. Cal.), the court treated an entry of a member of the armed forces after service overseas as a lawful entry and permitted naturalization even though the physical residence preceded that lawful entry. Regardless of the validity of its reasoning,³ the decision that lawful entry *after* the continuous period of residence satisfies the statute does not serve petitioner here, where the original lawful entry had been terminated by departure and the necessary period of physical residence is not tied to any lawful entry. There

³ The district court's decision was not appealed. The judgment was also supportable on the ground that the original entry was not in fact illegal since the applicant was a minor at the time the entry was made and the alleged illegality stemmed from his mother's intent, in entering on a transit visa, to remain here permanently.

must, at the very least, be a direct connection between the lawful admission and the required physical residence.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

MALCOLM ANDERSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

JULY 1958.

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No. 110

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INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Question presented.....	1
Statute involved.....	2
Statement.....	3
Summary of argument.....	5
Argument.....	8
I. The statute requires a lawful presence in the United States.....	9
II. The legislative history discloses a clear intent that the legislation apply only to aliens "law- fully in the United States".....	14
Conclusion.....	21

CITATIONS

Cases:

<i>Apollonio, In re</i> , 128 F. Supp. 288.....	13
<i>Bonetti v. Rogers</i> , 356 U. S. 691.....	5, 10
<i>Tchakalian's Petition</i> , 146 F. Supp. 501.....	13
<i>United States v. Boubaris</i> , 244 F. 2d 98.....	4, 12

Statutes:

Act of May 25, 1932, 47 Stat. 165.....	13
Act of June 30, 1953, c. 162, § 1, 67 Stat. 108, 8 U. S. C. (Supp. V) 1440a.....	2, 3, 8, 9, 14
Immigration and Nationality Act of 1952, Sec. 329, 8 U. S. C. 1440.....	6, 11

Miscellaneous:

97 Cong. Rec. 30.....	15
98 Cong. Rec. 776-777.....	15
7798.....	16
9061.....	16
9062.....	16
9063.....	16
99 Cong. Rec. 2332.....	14, 18
2639.....	14, 17
6621.....	20

Miscellaneous—Continued

	Page
H. R. 401, 82d Cong.....	6, 15
H. R. 1739, 83d Cong.....	17
H. R. 4233, 83d Cong.....	7, 14, 17
H. Rep. No. 223, 83d Cong., 1st Sess.....	17, 18, 19
H. Rep. No. 1176, 82d Cong., 1st Sess.....	15
S. 693, 83d Cong.....	17
S. 1759, 83d Cong.....	17
S. Rep. No. 1713, 82d Cong., 2d Sess.....	15-16
S. Rep. No. 378, 83d Cong., 1st Sess.....	20

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 12-14) is reported at 254 F. 2d 4. The findings of fact and conclusions of law of the District Court appear at R. 4-5.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1958 (R. 15). The petition for a writ of certiorari was filed on June 16, 1958, and was granted on October 13, 1958 (R. 16). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether an alien whose years of physical residence in the United States followed an unlawful entry in 1952 may be naturalized under 8 U. S. C. (Supp. V) 1440a (2) on the basis that, on a previous occasion in

1951, he had been lawfully admitted for 29 days as a seaman.

STATUTE INVOLVED

The Act of June 30, 1953, c. 162, § 1, 67 Stat. 108, 8 U. S. C. (Supp. V) 1440a, provides in pertinent part:

Notwithstanding the provisions of sections 310 (d) and 318 of the Immigration and Nationality Act, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all the requirements of the Immigration and Nationality Act, except that—

(a) he may be naturalized regardless of age;
 (b) no period of residence or specified period of physical presence within the United States or any State after entering the Armed Forces shall be required * * *;

(c) the petition for naturalization may be filed in any court having naturalization jurisdiction * * *;

(d) * * * the petitioner may be naturalized immediately if prior to the filing of the petition, the petitioner and the witnesses shall have appeared before and been examined by a representative of the Immigration and Naturalization Service; and

(e) no fee, except that which may be required by State law, shall be charged * * *.

STATEMENT

Petitioner, a native and citizen of China, arrived off Newport News, Virginia, on January 27, 1952, aboard the S. S. *Ocean Star*. Upon inspection by the Immigration and Naturalization Service, he was ordered detained on board the vessel as a person not admissible as a bona fide seaman. He escaped and remained at large in the United States until apprehended on June 8, 1952. After a hearing conducted on July 11, 1952, and exhaustion of administrative remedies, petitioner, on January 15, 1954, was ordered deported (R. 7-8). However, the delivery bond was cancelled by the Immigration and Naturalization Service upon learning that petitioner had been inducted into the Army on May 4, 1953¹ (R. 8). Petitioner served until May 3, 1955, at which time he was honorably discharged. He did not serve overseas (R. 8).

On December 22, 1955, he filed his petition for naturalization under the Act of June 30, 1953, *supra*, p. 2, in the United States District Court for the Southern District of New York, alleging that he was lawfully admitted to the United States "at Newport

¹ Petitioner's selective service file, which we have examined, gives no indication that the local board knew, either when petitioner registered with the board in December 1952 or when he was drafted in May 1953, the circumstances of petitioner's entry into the country or the fact that deportation proceedings were in process. Some five months after induction, in September 1953, the board received a letter from the Chief of the Expulsion Section of the New York Office of the Immigration and Naturalization Service requesting official verification that petitioner had been drafted.

News, Virginia, under the name of Tak Shan Fong on January 27, 1952 on the S. S. Ocean Star" (R. 3). At the hearing before the court, the Immigration and Naturalization Service recommended denial of the petition on the ground that his entry into the United States was unlawful (R. 8-10).

Petitioner's attorney then notified the court that petitioner had been at Honolulu, T. H., on two occasions prior to 1952. On August 24, 1951, he had been admitted at Honolulu as a seaman for 29 days and had departed with his ship. On October 15, 1951, at Honolulu, he had been ordered detained on board ship. The Immigration and Naturalization Service verified the prior entries but opposed the petition because the entry which resulted in his year's presence in the United States was unlawful.^{1a}

The District Judge, upon the basis of the entry into the United States on August 24, 1951, at Honolulu, granted the petition for naturalization (R. 4-5).

On appeal, the Court of Appeals reversed *per curiam*. It based its holding upon its previous decision in *United States v. Boubaris*, 244 F. 2d 98, in which it had held, with one judge dissenting, upon facts similar to those involved here, that the statute "required that the 'single period of at least one year' be immediately consecutive to the lawful admission required by that section." Such continuity was found lacking here (R. 12-14).²

^{1a} This information has been obtained from the Department of Justice file.

² Petitioner's motion for an *en banc* hearing was denied, with Chief Judge Clark noting that he agreed with the view of the dissent in *Boubaris* (R. 14).

SUMMARY OF ARGUMENT

Petitioner seeks naturalization under a statute relating to persons serving a minimum of 90 days in the Armed Forces, and requiring that he be a person "having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces." To satisfy the law, petitioner seeks to combine a permitted visit ashore from a vessel docked at Honolulu in 1951 with an illegal physical presence in the United States commenced by escape from his vessel at Newport News, Virginia, in 1952. In the Government's view, it was the purpose of Congress, specifically stated in the legislative history, that the provision apply "only to aliens who are legally and lawfully in the United States." It cannot be applied to petitioner, who was not lawfully admitted, merely because in the past he had made a brief lawful entry and had then departed.

I

The statutory language, read as a whole, provides for a "single period" of physical presence, legally commenced by lawful admission and followed by entry into the Armed Forces. The word "and" joins the "lawful admission" and the "physical presence" requirements. A totally disconnected and abandoned admission, far in the past, cannot be tacked to an unlawful current physical presence in the United States. Cf. *Bonetti v. Rogers*, 356 U. S. 691. The statute requires either (1) lawful admission for per-

manent residence or (2) lawful admission for temporary purposes plus physical presence for a single period of at least a year. The physical presence requirement is a substitute for permanent admission, and it must be tied to a legal admission.

The enactment here does not purport to throw wide the doors of naturalization as an unlimited reward for a minimum of 90 days' service in the Armed Forces. The contrast between the language of this provision and that relating to veterans of World Wars I and II (Section 329 (a) of the Act of 1952) shows that Congress receded from its previous policy of permitting naturalization of those who served in the Armed Forces whether or not lawfully admitted for permanent residence. It decided not to permit naturalization of aliens who entered illegally, even if such illegal entry resulted in liability to military service. Petitioner, as an alien who entered illegally, is not eligible under this statute.

II

The legislative history confirms the purpose to limit the statute to aliens "lawfully in the United States."

A. A bill (H. R. 401) in the 82d Congress, comparable, in the particular here involved, to the statute ultimately enacted by the succeeding Congress, was explained as inapplicable to "anybody illegally in the United States." The consideration given that bill shows that there was disagreement as to whether the benefits of accelerated naturalization should be made available to those lawfully admitted for temporary purposes as well as to those admitted for permanent

residence. At no point was there evinced any intent to go further and cover aliens unlawfully present.

B. The history in the 83d Congress, which enacted the present legislation, shows—to use the sponsor's words—a purpose to restrict the benefits to aliens “lawfully in the United States.”

As originally introduced (H. R. 4233), there was no provision for a “single period of at least one year at the time of entering the Armed Forces,” and it was in the context of this version that the Deputy Attorney General made the suggestion of which petitioner seeks to avail himself—a suggestion that the presence in the United States at the time of entering the Armed Forces be prescribed to be “lawful” and that the alien have the burden of proving lawful status. The House committee disagreed, fearing that the “technicalities” involved in establishing “continuance” of lawful status as a nonimmigrant might unduly burden the alien.

The very fact that the House was concerned by the technicalities of “continuance” of lawful status shows that Congress was thinking of those whose original entry was legal, *e. g.*, as a visitor or student, but who might have overextended their stay. The Senate Committee added the present requirement of physical presence for at least a year to the provision permitting naturalization of lawfully admitted nonimmigrants. This was designed to make certain that a nonimmigrant could not obtain citizenship by enlisting immediately. Only if he stayed long enough to be subject to the draft was the nonimmigrant to be allowed

to be naturalized. But nothing in the discussion of these amendments shows any intent to depart from the clear understanding that the Act applied only to those lawfully admitted.

Congress, we believe, made a deliberate choice to exclude from the benefits of this legislation aliens who entered illegally, even if they became liable for service as the result of such illegal entry. Here, petitioner entered illegally and was drafted subsequent to such illegal entry. It would nullify the Congressional decision to permit him to be naturalized merely because, a year before his illegal entry, he entered as a seaman on shore leave and thereupon promptly departed.

ARGUMENT

Petitioner seeks naturalization under a statute stating the express requirement that the applicant be a person who has served 90 days in the Armed Forces from 1950-1955,³ having been lawfully admitted to the United States. When the legislation was reported on the floor of the House of Representatives, its sponsor, replying to a direct question on the point, affirmed categorically that "it applies only to aliens who are legally and lawfully in the United States" (*infra*, p. 17; emphasis added). Moreover, the committee reports on the measure each quoted a letter of the Deputy Attorney General stating that benefits under the bill would be restricted

³ The statute expressly applies only to aliens who served in the forces "after June 24, 1950, and not later than July 1, 1955." Also, the petition for naturalization had to be filed not later than December 31, 1955. *Supra*, p. 2.

to aliens "having" a "lawful" temporary or permanent residence (*infra*, pp. 15-16). It is the government's position, based upon the statutory language and history, that the Act cannot be applied to one whose entrance into the army followed an unlawful entry into the country.

I

THE STATUTE REQUIRES A LAWFUL PRESENCE IN THE UNITED STATES.

The statute (*supra*, p. 2) provides for naturalization of aliens serving 90 days in the Armed Forces, between 1950 and 1955:

(1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, * * *.

The natural reading of the quoted language in its entirety is that clause (2) requires a "single" period of physical residence, lawfully commenced with a legal entry and terminated at the point of entering the armed services. Under the wording of clause (2) alone, it seems evident that the word "and" effects a joinder of the requirements for lawful admission and for physical presence of one year. This becomes even clearer when clause (2) is compared with clause (1), which requires no fixed period of residence where the lawful admission is for permanent residence. Lawful admission for permanent residence, in this context,

could not possibly refer to some lawful admission years before, which had been abandoned; it obviously means lawfully admitted for permanent residence at the time of entrance into the army. See *Bonetti v. Rogers*, 356 U. S. 691, where this Court held that an entry which was followed by departure and subsequent readmission could not even be considered an entry under a statute providing for deportation as a consequence of certain activities taking place after entry. No more can an earlier abandoned temporary admission be used to satisfy clause (2), which requires not only a legal entry but also a single physical presence of at least a year. There is no warrant in the language of the statute for petitioner's attempt to split the requirements of clause (2) (which are clearly intended to be more stringent than clause (1)) into unconnected parts so that one of those parts—temporary lawful admission—could be met at any time in the alien's life, and, even though abandoned, tacked to a year's physical presence in the United States occurring years later.

On petitioner's theory, if his parents had brought him properly into the United States as an infant visitor in 1932 for only a few days, he could now contend that this early lawful admission must be coupled with his physical presence here as a deserting seaman in 1952 for the purposes of the naturalization statute. To state such a contention is in large part to answer it. The actual "lawful admission" now relied upon by petitioner is less dramatically removed in point of time, but is not different in kind. Equal violence

to the language of Congress is done by the coupling of a totally isolated and meaningless seaman's shore leave for a few weeks in Honolulu in 1951 with a physical presence in the United States commenced in 1952 with a totally different unlawful entry and continued by petitioner's ability to remain at large.⁴

Comparison of the instant, very limited, language with that of the broad provisions enacted for veterans of World Wars I and II⁵ discloses that in the present statute Congress has no longer chosen to open the doors of citizenship wide in return for a period of service in the Armed Forces. Section 329 of the Immigration and Naturalization Act of 1952 permits naturali-

⁴ Such a strained interpretation was not sought by petitioner at the outset. In his petition for naturalization, he specified the lawful admission upon which he relied as the entry on January 27, 1952, at Newport News, Virginia (*supra*, p. 3). It was only when the illegality of his entry and presence became obviously insuperable that the earlier entry at Honolulu in 1951, detached and long since abandoned, was relied upon.

⁵ Section 329 of the Immigration and Nationality Act of 1952 (8 U. S. C. 1440):

"Any person who, while an alien or a noncitizen national of the United States, has served honorably in an active-duty status in the military, air, or naval forces of the United States during either World War I or during a period beginning September 1, 1939, and ending December 31, 1946, and who, if separated from such service, was separated under honorable conditions, may be naturalized as provided in this section if (1) at the time of enlistment or induction such person *shall have been in* the United States, the Canal Zone, American Samoa, or Swains Island, whether or not he has been lawfully admitted to the United States for permanent residence, or (2) at any time subsequent to enlistment or induction such person shall have been lawfully admitted to the United States for permanent residence. * * *" (Emphasis added.)

zation of an honorably discharged veteran of such wars if at the time of induction he was in the United States or certain possessions "whether or not he has been lawfully admitted to the United States for permanent residence." It permits naturalization of a person who had never been in the United States at the time of induction if he is subsequently admitted for permanent residence. The instant statute narrows the class of persons who are to be "rewarded" for service in the Armed Forces by prompt naturalization. It requires actual presence in the United States at the time of induction and it requires legal entry. Congress has thus made it clear that illegal entrants are no longer eligible for naturalization merely because, by their illegal entry, they have subjected themselves to the requirements of the draft acts.⁶

A similar contrast with specific language in other naturalization statutes is noted in *United States v. Boubaris*, 244 F. 2d 98 (C. A. 2), which the court below had previously decided upon virtually identical facts. The court there pointed out (244 F. 2d at 100):

Where Congress has meant an unlawful admission to be no bar to naturalization, it has specifically so provided. See e. g. 8 U. S. C. A. § 1001 (1946 edition) 58 Stat. 886, 887 (1944);

⁶ Petitioner complains of the failure of the Immigration and Naturalization Service, upon belatedly learning of his induction, to obtain his release from the remainder of his term and to deport him forthwith (Pet. Br. 11). But liability to military service was one of the consequences which flowed from petitioner's voluntary decision to remain in the United States illegally.

where the language is: “* * * being unable to establish lawful admission into the United States,” and also 8 U. S. C. A. § 1440 (1952), which contains similar language.

Petitioner, on the other hand, points to the Act of May 25, 1932, 47 Stat. 165, dealing with veterans of World War I, which was more explicit than the present statute in providing that the alien “shall be required to prove that immediately preceding the date of his petition he has resided continuously within the United States for at least two years, in pursuance of a legal admission for permanent residence.” It may be granted that the instant statute is not as precise as that one, just as the instant requirements are not as stringent. The fact remains that the language involved here is clear enough to show that Congress did not intend to permit naturalization of illegal entrants. Petitioner was an illegal entrant when he entered the armed forces.⁷ His entry remained illegal throughout his military service and thereafter.⁸ He

⁷ Where the entry which immediately preceded the physical presence was lawful for a temporary period, such as entry by a seaman, the courts have held that subsequent failure to maintain a lawful status does not bar naturalization under this statute. *In re Apollonio*, 128 F. Supp. 288 (S. D. N. Y.). Under this view, if petitioner had remained in the United States after his legal entry in 1951, and had served in the armed forces, he could have been naturalized.

⁸ In *Tchakalian's Petition*, 146 F. Supp. 501 (N. D. Cal.), the court treated an entry of a member of the armed forces after service overseas as a lawful entry and permitted naturalization even though the physical residence preceded that lawful entry. Regardless of the validity of its reasoning, the decision that lawful entry after the continuous period of resi-

is therefore not in the group which Congress intended to benefit by this statute.

II

THE LEGISLATIVE HISTORY DISCLOSES A CLEAR INTENT THAT THE LEGISLATION APPLY ONLY TO ALIENS "LAWFULLY IN THE UNITED STATES"

If the purpose of Congress to limit the benefits of 8 U. S. C. 1440a to aliens who had been lawfully admitted to the United States at the time of their entrance into the armed services were otherwise doubtful, the legislative history would resolve the doubt.

The legislation, passed by the 83d Congress, was introduced in the House of Representatives, as H. R. 4233, on March 25, 1953 (99 Cong. Rec. 2332), and was reported out of committee by Congressman Graham on April 1, 1953 (99 Cong. Rec. 2639). At that time, Congressman Walter asked: "Is this not the bill that is identical with the law as it existed during the war with the exception that it *applies only to aliens who are legally and lawfully in the United States?*" (emphasis added). Congressman Graham replied, "That is a correct statement." There followed a question by Congressman McCormack: "This also covers those who are in the service, aliens, who have permanent or *temporary* visas?" To which Congressman Graham again replied, "Correct" (99 Cong. Rec. 2639; emphasis added).

dence satisfies the statute does not serve petitioner here, where the original lawful entry (in 1951) had been terminated by departure and the necessary period of physical residence is not tied to any lawful entry.

This is the nub of the matter. In order to give a full picture of the history, however, we shall trace the various legislative proposals, made in the 82d and 83d Congresses, which culminated in the enactment of Section 1440a.

A. On January 3, 1951, Congressman Walter introduced H. R. 401 to provide for the expeditious naturalization of aliens serving in the armed forces (97 Cong. Rec. 30). In the committee report on the bill, there appeared significant language that was to characterize subsequent reports until the enactment of the present legislation. The stated purpose of the bill was to provide means for the "expeditious" naturalization of aliens serving in the Armed Forces (H. Rept. No. 1176, 82d Cong., 1st Sess., p. 1). It was then stated that, while the bill eliminated the requirement of a specified period of residence, "it proposes benefits only for the alien who has effected lawful entry, either in an immigrant or nonimmigrant status" (*id.*, p. 2).

As introduced by Congressman Walter, that bill extended its benefits to one—

who having been lawfully admitted, temporarily or otherwise, * * * shall have been at the time of entering the Armed Forces within any such area [98 Cong. Rec. 776-777].

Congressman Walter assured the House that "there is nothing in the law that permits *anybody illegally in the United States* to take advantage of it" (98 Cong. Rec. 776; emphasis added). A letter of the Deputy Attorney General (March 13, 1952, S. Rep.

No. 1713, 82d Cong., 2d Sess., p. 4) expressed the same understanding, *i. e.*, that "the benefits of this bill are to be limited to aliens having a lawful temporary or permanent residence * * *" (*ibid.*).

When the bill reached the Senate, the provision for those lawfully admitted "temporarily or otherwise" was changed to require lawful admission "for permanent residence" (S. Rep. No. 1713, 82d Cong., 2d Sess., June 9, 1952, p. 2). In presenting the amended bill on the Senate floor, Senator McCarran stated: "This amendment is designed to prevent naturalization of aliens who jump ship or who otherwise remain in the United States in an illegal status but who succeed in getting in our Armed Forces" (98 Cong. Rec. 7798). But Senator Lehman pointed out that there were "those who may be lawfully admitted for temporary residence," citing the example of a student thus lawfully admitted (98 Cong. Rec. 9061-9062, 9063). Senator Lehman, in urging the reinstatement of coverage for those temporarily admitted (which was effected in the next Congress), pleaded the case of one admitted "for" lawful residence. Senator McCarran opposed the reinstatement (98 Cong. Rec. 9063). The bill was not passed.

What is noteworthy in the proceedings before the 82d Congress is that there was disagreement only as to whether the bill should go so far as to cover aliens having a lawful temporary status; at no time was there any suggestion that the bill should go further and cover aliens whose presence in this country and

induction came about as a consequence of an illegal entry.

B. In the 83d Congress, a number of bills for the same purpose were introduced (H. R. 1739, H. R. 4233, S. 693, S. 1759). The House Committee on the Judiciary reported out H. R. 4233 (the text appearing at 99 Cong. Rec. 2639) and it was upon the presentation of the bill on the floor of the House that there occurred the categorical statement by the sponsor, Congressman Graham (referred to *supra* p. 14), *i. e.*, that the bill "applies only to aliens who are legally and lawfully in the United States" (99 Cong. Rec. 2639).

The committee report (H. Rep. No. 223, 83d Cong., 1st Sess.) is consistent with the sponsor's interpretation. It stated the purpose of "expeditions" naturalization, but gave no indication of an intent to open the door to those who were inducted while illegally in the United States. It spoke of the difficulties of the serviceman with respect to the *procedure* of becoming naturalized.⁹ It cited as examples of temporarily present aliens who would be covered by the bill the "students, visitors, 'treaty

⁹ "The routine naturalization procedure is impracticable in the case of the serviceman who, in the course of his training, is transferred from camp to camp * * *. Even more complicated is the case of the alien *admitted* temporarily who may return from honorable front-line service * * * to find himself confronted with an order of deportation. Consideration must also be given to the most unfortunate complications that might arise should an alien fall prisoner to the forces of an enemy state of which he is still technically a national" (*id.*, p. 2; emphasis added).

merchants' and their children, etc." who had been inducted under the selective service laws (*id.*, p. 2). It made no reference to aliens at large in the United States pursuant to unlawful entry.

The report also stated that the recommendations of the Department of Justice had generally been incorporated (*id.*, p. 2), setting forth in full the entire memorandum of the Deputy Attorney General (*id.*, pp. 3-4). This memorandum, like the interpretation by the sponsor of the bill, stated that the benefits of the bill were restricted to aliens "having" a "lawful" temporary or permanent residence (*id.*, p. 3). The committee did not adopt a suggestion of the Deputy Attorney General that the alien carry the burden of proof of lawful admission and that the word "lawfully" be repeated after the words "Armed Forces" in the phrase, "who, having been lawfully admitted to the United States * * * shall have been at the time of entering the Armed Forces within such area" (*id.*, p. 3; 99 Cong. Rec. 2639). As is apparent from the above-quoted excerpt from the bill, there had not yet appeared in the legislation at that stage any provision specifically requiring (as now) a "single period" of physical presence in the United States for at least a year at the time of entering the Armed Forces. Accordingly, petitioner's reliance upon the failure to adopt the Deputy Attorney General's suggestion (Pet. Br. 7) is not justified and, indeed, disregards the fact that the Senate, at a later stage, amended the legislation (*infra*, p. 20) in a fashion making more stringent the requirements as to nonimmigrants.

However, even as to this earlier form of the legislation, the committee discussion of the suggestion for amendment is opposed to petitioner's contentions, rather than in support. H. Rep. No. 223, 83d Cong., 1st Sess., p. 4, states:

The suggestion made by the Department that the serviceman bear the burden of proving lawful admission was not incorporated in H. R. 4233, since the administrative officers would have access to proper official records to enable them to verify such admission.

The proposal that the serviceman be required to have a lawful status at the time of entering the Armed Forces was not included in the bill. While lawful admission as an immigrant or nonimmigrant is held to be a prerequisite to naturalization under the terms of H. R. 4233, the committee is of the opinion that the technicalities involved in connection with the continuance of such status at the time of entering the Armed Forces would place an unwarranted burden on the serviceman and practically nullify the purpose of this legislation.

In relieving the serviceman of the "technicalities" of establishing "continuance" of the "status" of a lawfully admitted alien up to the time of entering the Armed Forces, the committee showed that it was thinking of "status" that had *originated* lawfully, but had not "continued" to remain lawful. It nowise suggests that a long-abandoned, prior, temporary lawful status would be sufficient where the alien's presence in the United States at the time of induction was actually the result of an illegal entry.

The Senate Committee was less generous in relation to aliens not admitted for permanent residence. The committee reported an amended bill with a one-year residence requirement, stating:

The instant bill differs from the bill, S. 693, in one significant respect. The bill, S. 693, extends the benefits of the act to aliens who have been lawfully admitted into the United States as immigrants or nonimmigrants. The instant bill, while it retains this feature, merely provides that a nonimmigrant must be in the United States for a period of at least 1 year before his service in the Armed Forces begins. This change was made in order to conform the bill to the requirements of the Selective Service Act [S. Rep. No. 378, 83d Cong., 1st Sess., p. 4].¹⁰

Senator Watkins, in presenting the bill on the floor of the Senate, said (99 Cong. Rec. 6621):

The bill also provides that a nonimmigrant must be in the United States for a period of 1 year before his service in the Armed Forces begins in order to conform the bill to the requirements of the Selective Service Act.

I think most Members of the Senate will remember that aliens who have been in the United States a year, lawfully, can be required to serve under the Draft Act.

¹⁰ The Deputy Attorney General's memorandum, relating to the earlier form of legislation (see *supra*), was set forth in the Senate report with the statement that it was "not included" (p. 4).

The one-year residence provision certainly did not weaken the requirement of lawful admission as a nonimmigrant. Rather, it made certain that only the visitor who came lawfully and stayed a minimum of a year would become eligible, upon service in the Armed Forces, for accelerated naturalization.

It was, of course, for Congress to decide the terms and conditions of naturalization. We believe it plain that Congress proposed to grant naturalization only to those who were lawfully admitted; and that it did not intend to "reward" illegal entry by permitting naturalization, even if the illegal entry resulted in service in the Armed Forces. The deliberate choice which Congress has made would be nullified in this case if petitioner, who escaped from his ship and entered illegally, were allowed to be naturalized on the basis of the fact that, some time previously, he had made a fortuitous and unrelated entry-and-departure as a sailor on temporary shore leave.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

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